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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
)

WT Docket No. 08-165

Petition for Declaratory Ruling to Clarify)
Provisions of Section 332(c)(7)(B) to Ensure)
Timely Siting Review and to Preempt under)
Section 253 State and Local Ordinances that)
Classify All Wireless Siting Proposals as)
Requiring a Variance)
_____)

COMMENTS OF THE CITY OF RED WING

These Comments are filed by the City of Red Wing to urge the Commission to deny the Petition filed by CTIA. As noted below, CTIA's Petition is without merit and without basis in law or fact. The City of Red Wing also joins in the Comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA") in response to CTIA's Petition. Section 253 of Title 47 of the United States Code does not apply to wireless tower sitings. Rather, 47 U.S.C. § 332(c)(7)(B) governs wireless tower sitings to the exclusion of § 253.

Section 332(c)(7)(B)(i) provides:

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

Section 253 on the other hand provides that no local government may prohibit or

effectively prohibit the provision of telecommunications services. The language in § 332 is specific to wireless service facilities, while § 253 address telecommunications generally.

Congress does not enact redundant code provisions. Further, the Supreme Court's ruling in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992), establishes that specific code sections supersede general code sections. Section 332 is very specific as to the remedies and procedures to be followed with respect to wireless facility applications.

Section 332 (c)(7)(B)(v) provides that any person adversely affected by a local government's final action or failure to act may, within 30 days, file suit in any court of competent jurisdiction. The court must hear and decide the suit on an expedited basis. Further, any person adversely affected by local government act or failure to act that is inconsistent with clause 32(c)(7)(B)(iv) may petition the Commission for relief. The specificity of these remedies shows that § 332 applies to wireless service facilities to the exclusion of § 253.

The Commission should also deny CTIA's Petition with respect to the request that the Commission should supply meaning to the phrase "failure to act." The Commission's authority to interpret language in the Communications Act of 1934 is limited to areas of ambiguity. "Failure to act" is not an ambiguous phrase. The word "failure" means the "omission of an occurrence or performance;" the word "act" means "to carry out or perform an activity." Taken together, the phrase "failure to act" means to omit the performance of an activity. Contrary to CTIA's assertion, there is nothing vague or ambiguous about this statutory language which would entitle the Commission to issue a declaratory ruling on this topic.

In addition, Congress made it perfectly clear that the time frame for responding to applications for wireless facility sitings is determined by reference to the nature of the application. Section 332(c)(7)(B)(ii) provides that local governments act on requests "within a reasonable time period, taking into account the nature of the request." Therefore, even if ambiguity existed in the statute, the FCC would be acting outside its authority by mandating a fixed time period and imposing a remedy for violating that mandate, where Congress clearly intended fluidity.

To assist the Commission in its evaluation, below are details specific to the wireless facilities siting process and experiences in City of Red Wing.

1. LEGAL REQUIREMENTS FOR FACILITY SITING

The State of Minnesota and the City of Red Wing requires certain notice and public hearings to ensure that the rights of the applicant and the public are preserved. These requirements are found in the following local code provisions: Chapter 11, Division 85 of the City zoning Code. Specifically, the City of Red Wing is required to provide published notice in a newspaper of general circulation and a mailed notice to all owners of property located within 500 feet of the boundaries of the subject property, at least ten

days prior to a public hearing, for wireless communications projects that require a conditional use permit. Other wireless communications project that require a Certificate of Compliance are reviewed and approved administratively and do not require public notice.

The City of Red Wing has a specific ordinance to address wireless facility siting. The ordinance was enacted in 1999 after public hearing and is found in Division 55 of the City Zoning Code listed below:

Chapter 11, Division 55-240 **Wireless Communications Facilities**

- A) **Purpose.** The zoning regulation of wireless telecommunications facilities is intended to provide for the appropriate location, development and installation of telecommunications towers and antennae within the City of Red Wing. The provisions of this Code are intended to protect the health, safety and aesthetic concerns of the community by minimizing the adverse visual effects of towers and antenna through careful design, siting and screening; by avoiding potential damage from tower failure to adjacent properties through structural standards and setback requirements; and by maximizing the use of existing towers, structures or buildings to accommodate new telecommunications antenna in the City.
- B) **Definitions.** For the purpose of this Chapter, certain terms and words are defined in Division 10, Definitions. Particular terms that apply include Accessory Equipment Structure; Antenna; Antenna, Concealed; Base Transceiver Station; Co-location; Tower; Tower, Lattice; Tower, Monopole; Utility Pole; and Wireless Telecommunication Services.
- C) **Allowance for Towers and Antenna by Zoning District.**
- 1) Permits are not required for:
 - a) Antenna and towers used by the City for City purposes.
 - b) Adjustment or replacement of the elements of an antennae array affixed to a tower or antenna, provided that replacement does not reduce the safety factor.
 - c) Antenna and/or towers erected temporarily for test purposes, for emergency communications.
 - d) Antenna and microwave dishes which are not located on a transmission structure such as the mounting of antenna and dishes upon buildings so long as they do not rise above the highest elevation of the building by more than fifteen (15) feet. This includes educational facilities, religious institutions, government or public utility buildings, or in "upward thrusting architectural elements" such as church steeples, bell towers or smokestacks.

- 2) Wireless telecommunications towers and antenna shall be allowed in any district as a certificate of compliance use permit only as provided below:
- a) Water Tower – Wireless telecommunication antennae shall be permitted upon City-owned water towers and park properties provided the applicant has an approved lease agreement with the City and has obtained a certificate of compliance use permit and paid all applicable fees. The height of the antennae on water towers shall not exceed fifteen (15) feet and shall not extend more than fifteen (15) feet above the water tower.
 - b) Co-location on Existing Towers – Wireless communication antennae shall be permitted to be attached to existing towers within the City in accordance with the applicable siting guidelines and design criteria in 55-230 (E) after the applicant has provided to the City a written statement of approval from the tower owner or lessor and has obtained a certificate of compliance use permit and paid all applicable permit fees.
 - c) Utility Poles – Wireless telecommunications antennae shall be permitted to be attached to utility poles after the applicant has provided a written statement of approval from the utility pole owner or lessor and has obtained a Certificate of Compliance use permit from the City and paid the necessary fee. The height of the antennae shall not exceed fifteen (15) feet and shall not extend more than fifteen (15) feet above the pole.
- 3) Conditional Uses, Specific Districts. Wireless telecommunication towers and antenna shall be allowed with the approval of a conditional use permit in the zoning districts specified in the table below and in accordance with the co-location requirements stated in 55-230 (D), siting requirements and design criteria stated in 55-230 (E), and the procedural requirements stated in 55-230 (F). The procedure for review and action on conditional use permits shall be as stated in Section 75-020. The height limitations listed in the following table shall include all parts of the wireless telecommunication tower and antenna structure except for that space needed for lightning diffusion apparatus.

<i>Zoning Districts Location</i>	<i>Height Limitations</i>	<i>With Co-location</i>
RM-2, B-1, and B-2	90 feet	150 feet *
I-1, I-2	100 feet	190 feet *

A, F-2	300 feet	400 feet *
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* Co-location height bonus subject to applicant providing to the City proof of a signed lease arrangement, shared use agreement, or other like document.

D) Co-location Requirements.

- 1) A proposal for a new wireless communication tower shall not be approved unless the applicant documents to the satisfaction of the City that the antenna planned for the proposed tower cannot be accommodated on an existing or approved tower or commercial or industrial building within a one-half mile radius, transcending municipal borders, due to one or more of the following:
 - a) The antenna would exceed the structural capacity of the existing or approved tower or commercial building.
 - b) The antenna would cause interference with other existing or planned equipment at the tower or building.
 - c) Existing or approved towers and commercial buildings cannot reasonably accommodate the antenna at a height necessary for the proposed antenna to function.
 - d) Existing or approved towers and commercial buildings are outside of the documented search area.
 - e) The owners or lessors of existing or approved towers and commercial buildings are unwilling to allow co-location upon their facilities or are unavailable to grant such an allowance.
 - f) Approval cannot be obtained for co-locating upon an existing tower or antenna site, which is within the documented search area, but outside the Red Wing municipal boundaries.
- 2) It is the City's intent to encourage co-location providers to share accessory equipment building space whenever possible and practical so as to minimize the number of necessary accessory buildings and their impact upon the surrounding community. An applicant co-locating on another provider's tower shall incorporate its base transceiver station and all other equipment into an existing accessory equipment building or suitable principal structure except as otherwise provided below. If this requirement cannot be met due to insufficient space within the existing accessory building, security issues, competition or compatibility concerns, or for other reasons, one of the following options, ranked in preferential order, shall be utilized:

- a) The existing accessory building shall be expanded to a size sufficient to house the co-locator's equipment. Such building expansion shall match the design and features of the existing accessory equipment building. The applicant shall obtain a building permit from the City prior to construction.
 - b) A support platform shall be constructed alongside and adjacent to the existing accessory equipment building upon which the co-locator's equipment shall be attached. The applicant shall obtain a building permit from the City prior to construction.
 - c) A separate building shall be constructed that conforms to all the requirements set forth in this Ordinance.
- 3) Whenever an application for a new wireless telecommunications tower includes a proposal for co-location, the Applicant shall present information that describes how the proposed tower is designed to accept additional antennas. In addition, approval of any conditional use permit for such an application shall include a condition that the applicant accepts future co-location projects.
- E) **Siting and Design Requirements.** The requirements of this section apply to all wireless telecommunications towers and antenna erected, constructed, placed, or replaced in the City. All wireless telecommunication towers and antennae shall be designed and situated to be visually unobtrusive to minimize the impact upon the neighboring uses and shall conform to the following design and siting criteria.
- 1) **Setbacks.** The minimum setback from any property line or public right-of-way for a wireless telecommunication tower is as follows:
- a) Front Yard, Side Yard, and Rear Yard in a non-residential zone shall be the setback required for the underlying zone.
 - b) All other towers in residential zones shall be located a minimum distance from any property line equal to 125 percent of the proposed tower height or 200 feet whichever is greater.
 - c) Towers shall not be placed between a principal building and any street (not including alleyways) abutting the property.
 - d) All equipment buildings/boxes or equipment areas shall comply with the minimum property line setbacks for a principal building in the underlying zone.
 - e) No wireless telecommunication site shall be located within 200 feet of an existing residence.

- f) No tower exceeding 60 feet in height shall be located within 1,000 feet of the boundary of a locally designated historic district as per Chapter 16 of this Code.
- 2) **Accessory Equipment Structures.** The base transceiver station and all other related equipment shall be housed in an existing building whenever possible. If an existing building is unavailable, a new accessory equipment building may be constructed according to Minnesota State Building Code requirements and shall be of the same or better construction, design and appearance as any principal structure or adjacent buildings. If the equipment is to be housed in a weatherproof cabinet-like structure in lieu of a building, it shall be mounted upon a suitable support platform.
- 3) **Fencing.** The Wireless telecommunication antenna tower and/or accessory equipment structure shall be surrounded with a six-foot (6') to eight-foot (8') high-galvanized chain link fence or an approved equivalent fence acceptable to the Zoning Administrator.
- 4) **Landscaping and Screening.** The wireless telecommunications tower and/or accessory equipment building shall be landscaped and screened with a mixture of six-foot (6') tall evergreens and one and one-half inches (1 and 1/2") caliper ornamental deciduous trees at a ratio of four (4) evergreens per every one (1) deciduous tree, spaced on less than eight (8") feet apart on center so as to achieve at least a fifty percent (50%) opaque screen. Trees may be clustered to create a more natural appearance to the screening. The Zoning Administrator, as applicable, may waive the landscaping and/or screening requirements upon request of the applicant if the existing landscaping and screening is deemed sufficient. In addition, the Zoning Administrator may allow alternatives to the landscape plans listed above in order to match existing landscape.
- 5) **Color.** The wireless telecommunication tower and antenna shall be of a neutral color such as light grey or sky blue unless another color is dictated by the Federal Aviation Administration (FAA), and be designed to minimize visibility and to blend into the surrounding environment.
- 6) **Roof-Mounted Wireless Telecommunication Antennae.** Roof-mounted wireless telecommunication antenna shall not be permitted on buildings with pitched-roofs, unless they are concealed antenna incorporated into upward thrusting architectural elements, such as a church steeple, spire or bell-tower, smokestack, etc. On flat roofs, the height of the antenna and mounting hardware may not be more than fifteen (15) feet above the highest point of the roof to which the antenna is attached.

7) **Structurally-Mounted Wireless Telecommunications Antenna.**

Telecommunication antenna mounted upon sides of buildings shall be attached flush against building side, not to protrude more than the depth of the antenna. Structurally mounted antenna not affixed to towers shall be made to blend into the design and contours of the structure.

8) **Prevention of Radiation.** Wireless Telecommunication antenna shall be subject to state and federal regulations regarding non-ionizing radiation and other health hazards related to such facilities. If the federal government adopts new, more restrictive standards, the antenna shall be made to comply or the antenna shall be removed by the owner or the City at the tower owner's expense. The owner or operator of the tower shall pay any associated costs of compliance verification.

9) **Lights.** No wireless telecommunication tower or antenna shall have affixed or attached to it in any way except during time of repair or installation, any lights, reflectors, flashers, day-time strobes or steady night time light or other illumination devices, except as required by the Federal Aviation Agency, the Federal Communications Commission or the City. This restriction against lights shall not apply to towers, which have been combined with light standards for illumination of ball fields, parking lots, playgrounds, or other similar public uses.

10) **Signs and Advertising.** The use of any portion of a tower for signs or advertising other than required warning signs shall be prohibited.

11) **Interference with Public Safety Telecommunications.** No new or existing telecommunications service shall interfere with public safety telecommunications.

F) Procedural Requirements.

1) **Certificate of Compliance and Conditional Use Permit.** Applicants requiring a Certificate of Compliance shall follow the procedures as set forth in Section 75-010. Applicants requiring a Conditional Use Permit shall follow the procedures as set forth in Section 75-020. Specific submission requirements for both permit applications include the following:

a) A notarized document from the property owner or lessor that allows the applicant to apply for a Certificate of Compliance or Conditional Use Permit to erect a wireless telecommunication tower and/or antenna.

b) Demonstration of need in accordance with this Code.

- c) A site plan, which shows property lines, location of wireless telecommunication tower or antenna, setback distances, any accessory equipment structure, fencing and landscaping proposed.
 - d) Sufficient information to show that construction, installation and maintenance of the wireless telecommunication tower and/or antenna will not create a safety hazard or damage to the property of other persons.
 - e) Proof of insurance in accordance with this Code.
 - f) If proposing a tower that will allow for co-location, a letter of intent that commits the Applicant to allow for the future co-location.
 - g) Any other information necessary for the City to evaluate the permit.
- 2) **Building Permits.** Applicants proposing to erect wireless telecommunication towers and/or antenna shall obtain a building permit. The towers and antenna are subject to inspection by the City building official to determine compliance with the City's building code construction standards. No building permit shall be issued by the City without prior approval of a Certificate of Compliance or Conditional Use Permit if applicable. When no Certificate of Compliance or Conditional Use Permit is required, the applicant shall provide to the City all information as required by Section 55-230 (F) of this Code at the time of application for building permits. Building permits shall not be required for the repair, replacement, adjustment and /or alteration of the elements of antenna arrays if such work does not reduce acceptable safety standards. The following information shall be provided at the time of the building permit request:
- a) A report and plan from a qualified and registered engineer or firm that specifies and includes the following:
 - i) The tower height and design including a cross section and elevation.
 - ii) The height above grade for all potential mounting positions for co-location antenna and the minimum separation distances between antennas.
 - iii) The capacity of the tower, including the number and type of antenna that the tower can accommodate.
 - iv) The steps that the applicant will take to avoid interference with established public safety telecommunications.

v) An engineer's stamp and registration number.

- 3) **Demonstration of Need.** The applicant shall provide a diagram showing the cell site configuration illustrating the coverage area of the proposed wireless telecommunication tower and/or antenna. This diagram shall demonstrate the frequency re-use and spacing needs of the wireless system in order to provide adequate coverage and capacity to address that cannot be adequately served by locating the antenna on an existing structure.
- 4) **Proof of Insurance.** The Applicant shall provide the City with proof of liability insurance, which protects against losses due to personal injury or property damage relating in any way to the construction, use, or failure of the tower, antenna or accessory equipment. Such proof shall be supplied to the City by the wireless telecommunication tower owner or lessee at the time of application and shall be made available to the City from time to time upon its request.
- 5) **Removal of Abandoned or Damaged Towers.** Any wireless telecommunications tower and/or antenna that are not used for one (1) year shall be deemed abandoned and the property owner shall remove the tower and /or antenna. If the owner fails to remove the tower and/or antenna after one (1) year, it may be removed by the City with the costs of such removal assessed against the property owner of the tower site.
- 6) **Violations.** Deviations from the approved construction plans and Certificate of Compliance or Conditional Use Permit are a misdemeanor, punishable as provided in Division 85 of this Code.

G) Nonconforming Wireless Telecommunications Antenna and Towers.

Any wireless telecommunications tower and/or antenna in existence as of the effective date of this Ordinance that does not meet or comply with the provisions of this Chapter are subject to Division 70 of the Zoning Code.

2. NUMBER OF APPLICATIONS AND OUTCOMES

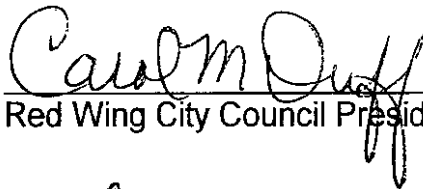
The City of Red Wing has processed nine wireless communication applications since January 2003. All of these applications involved co-location and, therefore, were administratively processed as a Certificate of Approval. The average processing time for these applications was 15 to 30 days. The average processing time for a new residential subdivision, big box retail, or industrial development is 60 days. The average annexation review period is 180 days. The only delays the City of Red Wing has experienced in reviewing co-location applications has been receipt from applicants of necessary rental agreement documentation. This has been caused by delays on the part of the applicant in negotiating lease agreements for co-location.

3. CONCLUSION

In conclusion, the Commission does not have the authority to issue the declaratory

ruling requested by CTIA because it would be contrary to Congress's intentions. Further, the current process for addressing land use applications ensures that the rights of citizens in our community to govern themselves and ensure the appropriate development of the community are properly balanced with the interests of all applicants. The system works well and there is no evidence to suggest that the Commission should grant a special waiver of state and local law to the wireless industry. Any perceived difficulties experienced by wireless providers can and are adequately addressed through the electoral process in each individual community and the courts. Federal agency intrusion is neither warranted nor authorized.

Respectfully submitted on behalf of the Red Wing City Council,



Red Wing City Council President Carol Duff



Red Wing Mayor Donna Dummer

City of Red Wing
315 W. 4th Street, Red Wing, MN 55066
651.385.3600

September 22, 2008

SEP 29 2008

FCC Mail Room

Resolution No. 5909***Statement of Opposition to CTIA (the wireless association) petition to the FCC***

This resolution serves to document the City of Red Wing's opposition to the above referenced petition which threatens to override local zoning regulation of wireless tower and antenna siting applications.

WHEREAS, the Red Wing City Council wishes to counter the assertion that Section 332(c)(7) of the Federal Communications Act of 1934 (as amended recently in 1996 when the Federal Telecommunications Act was adopted) that "failure to act" means failing to make a final decision on facility siting request in a particular amount of time (45 days for collocation; 75 days for other requests), and

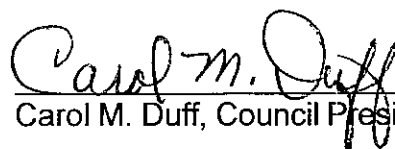
WHEREAS, the petition asserts that the FCC should implement a "deemed granted" result upon local governments which fail to act in the time frames referenced above; or establish a judicial presumption that a local government violated the Communications Act unless the zoning authority can justify the delay, and

WHEREAS, the petition asks that Section 332(c)(7)(B)(i)(II) be clarified to bar zoning decisions that have the effect of preventing a specific provider from providing service to a location if the basis of the zoning decision is the presence of another provider, and

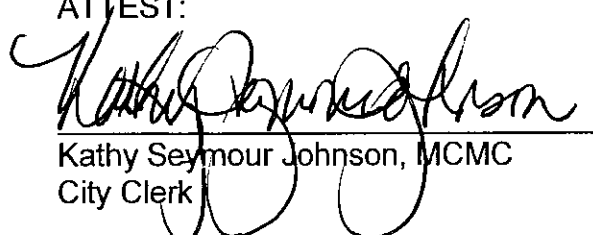
WHEREAS, the Red Wing City Council, pursuant to Section 253(a) of the Communications Act, opposes the request by the petitioner for the FCC to preempt local ordinances and state laws that may require a wireless service provider to obtain a variance before siting facilities.

NOW, THEREFORE, BE IT RESOLVED, that the City of Red Wing submit this resolution to the wireless telecommunications bureau of the FCC in response to public notice DA08-913 for WT docket #08-165.

Adopted this 22nd day of September, 2008.


Carol M. Duff, Council President

ATTEST:


Kathy Seymour Johnson, MCMC
City Clerk

(seal)

Presented to the Mayor at 10:30 p.m. on this 22nd day of September, 2008. Approved this 22nd day of September, 2008.

Donna Dummer
Donna Dummer, Mayor